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## Citation

Michelman, Frank. 2008. The not so puzzling persistence of the futile search: Tribe on proceduralism in constitutional theory. Tulsa Law Review.

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## THE NOT SO PUZZLING PERSISTENCE OF THE FUTILE SEARCH: TRIBE ON PROCEDURALISM IN CONSTITUTIONAL THEORY

Frank I. Michelman\*

### I

From me, just now, there can be no more fitting tribute to my friend and hugely admired colleague, Laurence Tribe, than a retrospect on his famous essay of 1980, “The Puzzling Persistence of Process-Based Constitutional Theories.”<sup>1</sup> “Persistence,” as I will call it for short, has the look of a *pièce d’occasion*—the occasion being, of course, the publication in 1980 of John Hart Ely’s great work on constitutional theory, *Democracy and Distrust*. But there was more to it than that, or so I mean to suggest. Rejoining to Ely in “Persistence,” Tribe picked up on a development in American constitutional theory that he called puzzling and disturbing: An aspiration, as he put it, “to purge constitutional discourse of inevitably controversial claims about substantive rights and values.”<sup>2</sup> I am going to suggest that Tribe was responding there to intellectual currents in which he himself had been involved and Ely may or may not have been—a budding proceduralistic turn, as I shall call it, in liberal thought about how to make constitutionalism the answer to a problem of political and legal legitimacy, while still accepting and respecting the hard social facts of ethical plurality and diversity.

Always dogging at the heels of liberal political and legal thought is the question of the moral justification for applications of organized social force—governmental and legal force—to supposedly free and equal individuals, in conditions of deep disagreement among them over basic values and aims for society and for individual lives. Call this the question of political and legal legitimacy.<sup>3</sup> Might the answer to it possibly lie in a body of constitutional law, aptly conceived, construed, and administered? Elaboration and dissection of that hope have been a major preoccupation

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1. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980).

2. *Id.* at 1079.

3. See e.g. John Rawls, *Political Liberalism* 137, 217 (Columbia U. Press 1993) (labeling his proposed answer to this question “the liberal principle of legitimacy”); Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 Phil. & Pub. Affairs 215, 218 (1987) (equating the question of political legitimacy with that of finding “a way of justifying coercively imposed political and social institutions to the people who have to live under them”).

for the field of study and debate we call constitutional theory, in which *Democracy and Distrust* and “Persistence” both hold deservedly honored places.

It is not legal theorists alone who have pondered the idea of a pivotal role for constitutional law in the redemption of political legitimacy on liberal terms. In recent decades, a like idea has drawn attention from leading political philosophers, in the United States and beyond, in what we may call a proceduralistic turn in the normative, political-theoretic speculations and arguments of liberal-minded thinkers. Very roughly (more on this later): If justification for the force of law can be found in the generally accepted, morally merited authority of the constituted processes whence contested laws issue, then no number of intractable disagreements over the substantive merits of particular laws can threaten it; legitimacy becomes secure in the midst of a great deal of substantive moral and ethical dissensus.

Tribe’s “Persistence” essay, I say—in a phrase that will require some explaining—“picked up on” this proceduralizing turn in the liberal quest for grounds of political legitimacy. A few years after its publication, in what (superficially, at least) has the look of a short sequel to “Persistence,” Tribe in fact would write of a “futile search for legitimacy.”<sup>4</sup> Being now myself caught up in my own examination of the proceduralistic turn and its hopes for legitimacy-via-constitutionalism,<sup>5</sup> I am nagged by the memory of Professor Tribe’s interventions. Today or tomorrow, I need to take the measure of their anticipations of my own puzzlements.

## II

Key to much of what I want to say about “Persistence” and Tribe’s related writings is a distinction I am about to launch between *democratic processed-based* constitutional theories (“DPCT”), epitomized for Tribe and countless others by John Ely’s masterpiece, and *liberal proceduralist* constitutional theories (“LPCT”), for which my exemplar will be John Rawls.<sup>6</sup> (And here I do not so much mean the John Rawls of the first great

4. “The Futile Search for Legitimacy” is the title of the opening chapter in Tribe’s book of 1985, *Constitutional Choices*. See Laurence H. Tribe, *Constitutional Choices* 3 (Harvard U. Press 1985).

5. For some published outcroppings, see e.g. Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement*, in *Habermas and Pragmatism* (Mitchell Aboulafia et al. eds., Routledge 2002) [hereinafter Michelman, *Disagreement*]; Frank I. Michelman, *Unenumerated Rights under Popular Constitutionalism*, 9 U. Pa. J. Const. L. 121, 141-53 (2006) [hereinafter Michelman, *Unenumerated*]; Frank I. Michelman, *Reply to Baker and Balkin*, 39 Tulsa L. Rev. 649 (2004); Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham L. Rev. 345 (2003); Frank I. Michelman, *Is the Constitution a Contract For Legitimacy?* 8 Rev. Const. Stud. 101 (2003) [hereinafter Michelman, *Contract*]; Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: A Comment on van der Walt and Botha*, 9 Constellations 246 (2002) [hereinafter Michelman, *Postmodernism*].

6. On Rawls as constitutional proceduralist, see Michelman, *Postmodernism*, *supra* n. 5, at 255-61. Others writing in the liberal proceduralist vein include Thomas Nagel, Charles Larmore, Jürgen Habermas and Thomas McCarthy. See e.g. Thomas Nagel, *Equality and Partiality* 33 (Oxford U. Press 1991) (connecting legitimacy to “unanimity—not about everything but about the controlling framework within which more controversial decisions will be made”); Charles Larmore, *The Moral Basis of Liberalism*, 96 J. Phil. 599, 606 n. 8 (1999) (connecting the liberal principle of legitimacy to the idea of constitutional principles that can be object of reasonable agreement); Thomas McCarthy, *Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue*, 105 Ethics 44, 57 (1994) (approvingly linking Habermas to the idea that those who regard a political system as “basically just” can accept as legitimate specific, resulting decisions that they do not approve); Michelman, *Disagreement*, *supra* n. 5, at 132-33 (addressing Habermas).

book, vintage 1971,<sup>7</sup> as the John Rawls of the second great book, vintage 1993.<sup>8</sup>) Whereas “Persistence” ostensibly directed its fire against Ely-style democratic process-based constitutional theories, I aim to show how the challenges (“puzzles”) that Tribe seemed most intent on framing there would have been more aptly directed to liberal proceduralist constitutional theories. Did Tribe’s essay in fact conflate or confuse these two types of theories? If so, why so? Those are my leading questions.

Democratic process-based constitutional theory first. A “thoroughly democratic” political system, let us say, is one that gives effect to the acts and choices of popularly-based, majoritarian political institutions, fairly run and maintained, on any and all topics not excluding those affecting fundamental rights or fundamental values. DPCT’s aim and ideal is a constitution written, construed, and carried out so as to establish and sustain a thoroughly democratic political system. The theory sees, however, the danger that the acts of democratic institutions will sometimes place in doubt or at risk their own democratic character—either in transacting the business at hand or for the future when that business takes effect—according to some favored, normative model for a proper democracy. In Ely-style DPCT, the normative model is that of what Ely called “representative democracy,” and the teaching is threefold: (1) Courts should construe the Constitution, and use constitutional review, to ensure that only decisions duly made according to the model take effect, while (2) decisions duly made according to model are to be accepted and heeded by the courts, no further questions asked, *except that* (3) constitutional checks should be available, and should be applied by courts, as necessary to keep such decisions from upending model-form representative democracy for the future.

Liberal proceduralist constitutional theories are quite different in principle, and they take a bit more explaining. Their aim and ideal is what I shall call a “legitimation-worthy” constitution. To judge a constitution legitimation-worthy is to find that its prescriptions, taken all together to comprise a unified political system, have a special kind of virtue or merit: They are such as to cast a mantle of moral justification over enforcement against everyone of approximately all of the laws, rulings, and decrees that issue in compliance with the system they comprise. The aim is thus a constitution whose terms are such as to allow you or me to say, with clear conscience, that any law whose process of enactment and whose content pass muster under its requirements can *ipso facto* be deemed a law with which all within range have good enough reason to comply, and which we, therefore, are justified in enforcing.

A legitimation-worthy constitution thus allows for “proceduralization” of judgments regarding the moral permissibility of collaboration in the enforcement of laws of uncertain and disputed moral and other merits. Instead of asking whether the worrisome law is good or bad or right or wrong in substance, one asks whether it is “constitutional,” a technical and a procedural question. If the answer is yes, those who

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7. See generally John Rawls, *A Theory of Justice* (Harvard U. Press 1971).

8. See Rawls, *supra* n. 3, at 137, 217 (1993) (proposing a “liberal principle of legitimacy,” which grounds legitimacy in the conformity of legislative and other political acts to a constitution meeting certain standards); see also Michelman, *Unenumerated*, *supra* n. 5, at 141-43; Michelman, *Contract*, *supra* n. 5, at 248-50, 255-61.

enforce the law are deemed justified in doing so, no matter how morally or otherwise deficient anyone, possibly including the enforcers, may find that law to be.<sup>9</sup> Judgments regarding the legitimacy—meaning the morally justified enforceability—of laws are in that way proceduralized. The burden of justification is displaced from the law in question to the legally constituted political system whence it issued. So what a legitimation-worthy constitution gives us, if we have one, is not just a procedure but a procedure imbued with a special virtue. It gives us, to wit, a *legitimation procedure*.

But how, then—according to what standard or test—do we judge a given constitution’s legitimation-worthiness? Standards must vary according to the moral premises underlying the particular brand of proceduralist constitutional theory in play. In the *liberal* variant (LPCT) whose imminent burgeoning is what I think Tribe caught on to in “Persistence,” a constitution’s legitimation-worthiness rests on a judgment—I put this very roughly—that everyone affected, ranking his or her own projects and commitments as no more, but also no less, deserving of consideration than anyone else’s, should be able to accept that constitution as an apt and fair set of governance arrangements for an ethically and otherwise diverse population of free and equal persons whose various aims, hopes, and projects will often come into conflict. I shall sometimes later call this the standard of the constitution’s presumable agreeability to everyone. (To give this idea a bit of substance, and to anticipate later discussion, consider whether an individual’s putative moral right to worship as he pleases supplies the only reason for a constitutional-legal guarantee of freedom of worship.)

It should by now be apparent that DPCT and LPCT address themselves, at least in the first instance, to different (but not unrelated) concerns. The rock-bottom concern of DPCT is, simply, *democracy*. The aim is to guard against the throttling of democracy either by constitutionalism (“government by judiciary”) or by democracy’s own internal breakdowns, disorders, and falls from grace. The rock-bottom concern of LPCT lies deeper. That concern is *legitimacy*, and legitimacy does not conceptually presuppose democracy. The aim is to explain the possibility of morally justifiable governmental and legal force for that population I mentioned of free and equal persons having diverse and conflicting interests, projects, and values. It is to redeem the possibility of liberally legitimate government and law—government and law on terms that all as free and equal should find acceptable—from the threat posed by perceived facts of widespread, intractable, potentially divisive disagreements over questions of values and rights. Democracy *might* be the answer or an indispensable part of it—most liberals think it is—but it also might not be. For those in quest of legitimacy, the legitimating force of democracy cannot be presupposed; it must rather be looked into.

Faced with the inevitability, in modern, free societies, of deep and persisting disagreement over “fundamental values” (we may as well use John Ely’s pet term for

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9. How does it work if our judgment is that only constitutions imposing certain kind of positive, protective obligations on governments can be legitimation-worthy? It seems that *no* law can pass legitimacy-muster under such a constitution unless the government is currently in compliance with *all* the positive obligations required for constitutional legitimation-worthiness. That may be one reason (it surely is not the only reason) for resistance to the inclusion of positive economic, social, and environmental guarantees in constitutions.

this field of dissensus<sup>10</sup>) it seems we cannot rest our hopes for political legitimacy on any expectation of a convergence of judgments regarding the moral or other substantive merits of the run of ground-level political outcomes—legislative acts, judicial rulings, executive decrees.<sup>11</sup> Anxiety results for liberals seeking justification for political and legal coercion (i.e., political legitimacy), and from it springs the thought that judgments regarding legitimacy must be severed from judgments regarding the substantive merits of ground-level outcomes as they come along, to be linked instead to claims respecting the deservingness of acceptance by everyone—the presumable agreeability to everyone—of the constituted processes from which the outcomes issue.

LPCT thus takes as focal a question about the grounds of justification for coercion by law that DPCT treats as already settled. DPCT takes as already established (perhaps, as with Ely, on partly historical grounds<sup>12</sup>) the legitimation-worthiness, in these United States, of our constitutionally prescribed, representative-democratic form and process of government. Liberal proceduralist theory does not. It addresses the antecedent question, about what a legitimation-worthy constitution for a country like ours would have to provide for, and so it cannot *start by* excluding the possibility that such a constitution would have to contain some of the very sorts of substantive constitutional guaranties that Ely-style process theory rejects. No doubt that is the conclusion reached, after argument, by some participants in LPCT debate, those who find that the best hope for a liberally legitimation-worthy constitutional practice—one that everyone as free and equal can accept as a legitimation procedure—lies in much the sort of constitutional practice endorsed by DPCT, in which external constriction of the lawmaking choices of representative-democratic political bodies is allowed, if at all, only for the sake of sustaining a properly representative-democratic political process.<sup>13</sup>

Others, however, emphatically disagree. For John Rawls and his allies, any liberally legitimation-worthy constitution—any constitutional system that can plausibly claim acceptability to everyone as free and equal—will have to be one that includes substantive guarantees having, in all honesty, nothing to do with preserving or perfecting the processes of representative democracy.<sup>14</sup> That will make the system problematic, if not downright objectionable, in the sight of Ely-style DPCT. For Rawls, it is fairly arguable that a legitimation-worthy constitution must guarantee a woman's right to choose termination of a pregnancy.<sup>15</sup> For Ely, such a right is unfit for constitutionalization because it is unrelated to securing or protecting representative democracy.<sup>16</sup> Thus the Ely-style DPCT that Tribe mainly addressed in "Persistence" and the LPCT on which (I say) he picked up toward the close of that essay are always

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10. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 43 (Harvard U. Press 1980).

11. See generally Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999).

12. See *infra* pt. IV; *id.* at nn. 34-37, 53-55 and accompanying text.

13. See e.g. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L.J. 1346 (2006).

14. See generally James E. Fleming, *Securing Constitutional Democracy* (U. Chicago Press 2006); Rawls, *supra* n. 3.

15. John Rawls, *The Idea of Public Reason Revisited*, in *John Rawls: Collected Papers* 573, 605-06 (Samuel Freeman ed., Harvard U. Press 1999); Rawls, *supra* n. 3, at 243-44 n. 32.

16. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).

living on the edge of incompatibility.

### III

Toward the close of “Persistence,” Tribe wrote of a certain “aspiration” that he found hard to explain, and moreover thought was leading to a troublesome “situation” and “prospect” for American constitutional theory.<sup>17</sup> The puzzling aspiration—which Tribe seemingly attributed to Ely, although, as I shall be suggesting, with questionable warrant for doing so—was, to repeat, that of “purg[ing] constitutional discourse of inevitably controversial claims about substantive rights and values.”<sup>18</sup> The problematic, resulting situation was, simply, that in which the said aspiration has theory in its grip. The aspiration to steer constitutional discourse clear of controversial substance, Tribe wrote in his essay’s closing passage, “apparently strike[s] chords so responsive, accord[s] with beliefs so deep,” that mere demonstrations of its impossibility or absurdity for us (we being otherwise conditioned as we are) are “beside the point”<sup>19</sup>—by which, I take it, Tribe meant that such demonstrations have no prayer of putting a stop to the quest for a strictly procedure-focused, substance-free constitutional discourse, so strong and deep is the motivation behind it. This was a case—Tribe more or less politely conveyed—of the wish being father to the thought, “as though” (marvelous line!) “such theories could banish divisive controversies from . . . the realm of constitutional discourse by relegating those controversies to the unruly world of power.”<sup>20</sup> And what, Tribe wondered at the very end, does it say about “our situation, and about the prospect for constitutional theory, that views so deeply problematic continue to exert so powerful a grip upon our thought?”<sup>21</sup>

A fine question, no doubt, but what was it doing in an essay on Ely’s book? On Tribe’s own showing, as we are about to see, *Democracy and Distrust* does not in fact evince the aspiration to purge constitutional discourse of controversial claims about values. Such an aspiration has a lot more to do with the aims and concerns of LPCT, which Tribe’s essay did not separately mention or address, than it has to do with DPCT, for which Ely stands as exemplar. Tribe’s worry about “our situation” and its cloudy prospect for constitutional theory seems misdirected to Ely’s book.<sup>22</sup> This point requires some development. We need to retrace with a bit of care what Ely’s argument was, and also what it was not.

### IV

Ely’s topic was that old constitutional chestnut, judicial review, and especially Warren-Court-style, “activist” judicial review. For writers most strenuously opposed to such a practice and its acceptance by Americans—we can mention as examples Robert Bork at around the time Ely was writing *Democracy and Distrust* and Jeremy Waldron

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17. Tribe, *supra* n. 1, at 1079-80.

18. *Id.* at 1079.

19. *Id.* at 1080.

20. *Id.* at 1065.

21. *Id.* at 1080.

22. Tribe, *supra* n. 1, at 1080.

today<sup>23</sup>—installation of a judicial protectorate against the errors and excesses of elected assemblies registers as a failure of nerve, as apostasy from the democratic creed, as a stain on democratic honor.<sup>24</sup> Not so for John Ely. Decidedly not so, for what is *Democracy and Distrust*, after all, if not a brief in support of judicial activism—specifically, the activism of the Warren Court, whose Chief is the book’s dedicatee?<sup>25</sup>

Ely anchored his defense of Warren to our country’s obvious, unquestionable commitment to representative democracy as its form of government. If that strikes you as an unexpected choice for a defense of judicial activism, you must recall that, in Ely’s view, the representative democracy that Americans historically have espoused, and that anyone has reason to value, is not a bare matter of rule by electoral majorities, or by majorities of those elected.<sup>26</sup> As most fully and forcefully shown by James E. Fleming,<sup>27</sup> but also as immediately spotted by Tribe,<sup>28</sup> Ely’s standard model of representative democracy is a substantively thick conception, reflecting a distinct and contentious idea of rightness in politics. It is, in fact, a prescriptive and idealized version of liberal interest-group pluralism,<sup>29</sup> dedicated to the thoroughly substantive proposition that everyone is to have an equal chance to count politically for one and no more than one.<sup>30</sup> American representative democracy thus carries a commitment to maintaining in our political order certain conditions—the channels of political change to be kept clear, systematic occlusions of minorities from those channels to be prevented or offset—that sitting legislative majorities will always be prone to neglect and even to reverse, unless held in check by some external discipline.<sup>31</sup> Judicial review for that purpose, which Ely

23. See e.g. Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L.Q. 695 (1971); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); Waldron, *supra* n. 13; Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 Oxford J. Leg. Stud. 18 (1993).

24. See Richard D. Parker, *Democratic Honor: Liberal and Populist*, 39 Har. Civ. Rights-Civ. Libs. L. Rev. 291 (2004); see also Frank I. Michelman, *Family Quarrel*, 17 Cardozo L. Rev. 1163, 1164-70 (1996) (discussing Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 278 (William Rehg trans., MIT Press 1996) (diagnosing and criticizing tendencies to turn the constitutional judiciary into “a pedagogical guardian or regent” for a people despairing of its own competence to govern itself)).

25. See Ely, *supra* n. 10, at v (dedication), 73-75 (Warren Court activism).

26. For a more strictly majoritarian-proceduralist view, see Waldron, *supra* n. 11, at ch. 5; Waldron, *supra* n. 13, at 1388 (“[F]or legislatures, we use a version of [majority decision] to choose representatives and we use a version of [majority decision] for decisionmaking among representatives. The theory is that together these provide a reasonable approximation of the . . . application of the values underlying [majority decision] to the citizenry as a whole.”).

27. See generally Fleming, *supra* n. 14, at 19-36.

28. See Tribe, *supra* n. 1, at 1077-78 (“Why *should* politics be open to equal participation by all? Doesn’t that norm itself presuppose some substantive vision of human rights?”) (emphasis in original).

29. Ely, *supra* n. 10, at 102, 135 (connecting representation reinforcement to “pluralist political theory”).

30. *Id.* at 100 (construing the Constitution as a “scheme designed to ensure that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect”). Ely thought of his favored conception of representative democracy as a kind of “applied utilitarianism.” John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 Ind. L.J. 399, 407 (1978). He also saw it as connected to the moral conception of political equality—of “equal concern and respect in the design and administration of . . . political institutions”—championed by Ronald Dworkin. Ely, *supra* n. 10, at 82 (quoting Ronald Dworkin, *Taking Rights Seriously* 180 (Harvard U. Press 1977)).

31. Ely, *supra* n. 10, at 103.



dubbed “representation-reinforcing” review, and with which he found the practice and the preaching of the Warren Court to be mainly in line, was thus, by Ely’s argument, the opposite of democracy-defeating; it was democracy maintaining—assuming, of course, that you bought into Ely’s normatively loaded, substantively enriched account of what democracy is and is for.

Ely claimed a number of institutional advantages for his process-perfecting line of justification of activist review, as compared with attempts to justify the sort of roving judicial guardianship of liberal rights he was opposing.<sup>32</sup> Judicial review keyed to representation reinforcement, Ely claimed, fits much better with any plausible claim of a special competence in judges than does the idea of a judicial police against deviations from fundamental values.<sup>33</sup> It thus also fits better with widespread popular understandings of limits on the judicial role in a representative democracy.<sup>34</sup> But Ely did not let his justification of the Warren Court ride solely on a thickly normative conception of representative democracy plucked, as it were, out of thin air by John Ely in the role of free-floating political pundit. He also found for his view a clear warrant in facts of national history and national positive legislation, specifically in the legislation of that law we call the Constitution of the United States. In a performance of what he called “the ultimate interpretivism,”<sup>35</sup> Ely argued at length that the text and structure of the Constitution as written and ratified conform persuasively to the same normative program for a representative democracy that he also found most satisfyingly explains the activist role of the Warren Court<sup>36</sup>—thus neatly flipping “democratic theory” from a condemnation into an endorsement of that Court’s performance in office.<sup>37</sup>

## V

Enter Laurence Tribe. As a skeptic early into the fray, in a short and sharp work that achieved preëminence in a field not lacking other worthy entrants,<sup>38</sup> Tribe in his “Persistence” essay skewered the idea that you could purge controversial substance out of constitutional-legal discourses just by getting courts to stick faithfully to a large, normative plan for a representative democracy that you (and let us even say everyone agrees on this) have found ensconced in the Constitution and the American way.<sup>39</sup> Tribe’s assault on this idea proceeds in three principal steps, which combine to show how the Constitution’s plan as written poses to anyone seeking to follow it, including any judge, the need to answer more than a scattering of daunting, large questions of value-ordering—indeed questions of “the very sort [that] the process-perfecters are at

32. See e.g. *id.* at 43 (naming judicial exegesis of “fundamental values” as the “traditional competitor” to an equally untenable, clause-bound interpretivism).

33. See *id.* at 101-02 (asserting a special competence of lawyers and judges in matters of fair process).

34. See *id.*

35. *Id.* at 87-88.

36. See Ely, *supra* n. 10, at 88-101.

37. *Id.* at 88-89 n. \*.

38. See Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 Ohio St. L.J. 223, 232-35 (1981); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 Yale L.J. 1037, 1045-57 (1980).

39. See e.g. Ely, *supra* n. 10, at 77 (referring to “the American system of representative democracy”).

such pains to avoid,” questions of “substantive rights and values.”<sup>40</sup>

The showing starts out with a relatively obvious and mild point. Among *leitmotif* principles expressly laid down by the Constitution, which Americans surely will find emblematic of that instrument’s special character and spirit, we find several—anti-slavery, anti-establishment, religious freedom, protection for private property and contracts—that cannot plausibly or without contortion of sense be entirely reduced to requirements or preconditions for a representative-democratic process. That is a point that Ely himself had seen fit to grant up front, if somewhat coyly.<sup>41</sup> “[G]iven the complexity of the document,” Ely wrote in a telling footnote, “the argument from the nature of the Constitution . . . must be qualified in any event.”<sup>42</sup> Ely plainly felt that this concession did no real damage to his claim that the written Constitution’s *central* and *dominant* meaning—its “mainstream”<sup>43</sup>—is the plan it adumbrates for a representative-democratic form of government, a sort of plan that would seem tendentiously hostile to the judicial excursions into so-called “unenumerated” rights—whether under the heads of “due process,” “equal protection,” “privileges or immunities,” or “rights retained by the people”—that Ely was most intent on criticizing.<sup>44</sup>

So Tribe needed to go further, and he knew it. “Our constitutional reality,” he said, poses problems for process theory that cut “deeper” than the mere fact of the Constitution’s inclusion of a small handful of substantive guarantees.<sup>45</sup> How so? Because “[e]ven the Constitution’s most procedural prescriptions cannot be applied in the absence of [theory] whose derivation demands precisely the kinds of controversial substantive choices” that in Ely’s version of representative democracy belong properly to the electorate and its representatives.<sup>46</sup> This subtle second step in Tribe’s showing—this hoisting of Ely on his own petard—is far more damaging than the first to the idea of substantively non-controversial judicial review (assuming for now that such was Ely’s idea), precisely because it does not depend on defeating Ely’s grand interpretative claim, a feat that is hard to pull off because that claim is, after all, a matter of . . . well . . . interpretation.

Here is what I mean: We can grant, if you like (although many will balk), that the Constitution itself makes plain the framers’ project to create a governmental system of representative democracy, in which all substantive value orderings, all questions of substantive rights and values, would be left to the people and their elected representatives acting free of external oversight. One still must ask whether the project was one that could possibly have been carried out under the Constitution they wrote (let alone any they might have written). Tribe’s answer is “no,” and he backs it up with force and insight. He shows that the Constitution’s ostensibly process-centered norms—those regarding structural and adjudicative due process as well as those regarding democratic

40. Tribe, *supra* n. 1, at 1064.

41. See Ely, *supra* n. 10, at 92-101.

42. *Id.* at 88-89 n. \*.

43. *Id.* at 100-01.

44. See U.S. Const. amend. V (due process); *id.* at amend. IX (rights retained by the people); *id.* at amend. XIV (privileges or immunities, due process, equal protection); Ely, *supra* n. 10, at 14-41.

45. Tribe, *supra* n. 1, at 1067.

46. *Id.*

suffrage and elections—are so incompletely specified as to require, at the stage of application to cases, resort by judges to value-ordering choices apparently not different in kind or contentiousness from those that a court confronts in resolving (say) whether the freedom of an adult couple to set the terms of their own sexual intimacies is encompassed in the liberty protected by the due process clauses.<sup>47</sup>

Tribe's third step extended his second into a critique of Ely's "core 'process value,'" that of "protecting certain minorities from perennial defeat in the political arena."<sup>48</sup> Tribe showed that you could not say *which* minorities to protect without substantive theorizing to establish "which groups are exercising fundamental rights and which are not," or which "hierarchical visions are substantively out of bounds . . . as a justification for government action."<sup>49</sup>

All told, Tribe's refutation of the likelihood that representation-reinforcing review under our Constitution could economize measurably on judicial resort to choices and determinations of substantive values was deft and strong. But what I find most striking in his treatment, from today's vantage point, is the way in which Tribe made the publication of Ely's book an occasion for launching a distinctly deeper and wider reflection, the ultimate "puzzle" toward which his title gestures, that of the onset and persistence of the impossible, destined-to-failure aspiration to purge controversial substance out of constitutional discourse, when strictly speaking Ely need not be understood as joining any such project as that.

Now this, I must grant, is a point I have come only recently to grasp, under strong tutelage from James Fleming.<sup>50</sup> It is all the same true. Ely's book is, to repeat, a brief in support of Warren Court activism. The brief takes the form of a defense of "representation-reinforcing" judicial review or, in other words, activist judicial review in aid of Ely's favored, substantive-value-laden model of a representative-democratic form of government.<sup>51</sup> That entails, of course, a defense, as apt and right for this country, of the model that the judges are expected to support by activist exercise of their review powers. But then to vindicate the rightness for us of the model is *ipso facto* to vindicate the rightness for us of the values—say, of equality of concern and respect—that animate and infuse the model. Vindication of the rightness for us of a set of substantive value commitments was thus a crucial part of Ely's self-assigned task in *Democracy and Distrust*.

Granted, Ely's vindication of the values and of the ideal model of a representative democracy they imply would not necessarily have to take the form of a direct, moral-philosophical defense of them by him. In fact, it may seem that no respectable defense *by Ely* of *any* constitutional-interpretive proposition could take that form. How could the man who derided philosophical "reason" as a laughably arbitrary basis for counter-

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47. See *id.* at 1067-72 (asserting that process-focused judicial review requires "a developed theory of fundamental rights that are secured against the state").

48. *Id.* at 1072.

49. *Id.* at 1072-76; see Laurence Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1911-12, 1912 n. 68 (2004) (applying his analysis in "Persistence" in a critique of Justice O'Connor's concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)).

50. Fleming, *supra* n. 14, at 26-27.

51. See *supra* nn. 28-33 and accompanying text.

majoritarian judicial dictations of constitutional law—“We like Rawls, you like Nozick. We win, 6-3.”<sup>52</sup>—purport to defend the project of activist, representation-reinforcing constitutional interpretation and application by judges on grounds of the philosophical verity of any set of values? For Ely, it seems, what would finally justify and require representation-reinforcing judicial review in the United States was not the authority of Bentham or Mill, or even of someone more American, say Robert Dahl in his normative-philosophical mode.<sup>53</sup> It was rather a substantive political ideal found already inscribed in the positive legislation and surrounding practice that Americans at large accept as their country’s political and legal constitution, or constitutional law.

But of course a substantive, value-laden political ideal thus inscribed is still a substantive political ideal. It is still presumably contentious to whatever extent is presumed to hold true for substantive claims as a class. You do not take the contentiousness out of the substance, or out of choices regarding its most apt effectuation in hard and disputed cases, by arguing, as a matter of interpretation, that a valid law (the Constitution) enacts it. Duly enacted though it be, in play here is a substantive moral theory of good and right government. There it sits, in plain view, at the foundation of Ely’s argument. Nor is this some embarrassing secret that Ely’s critics have had to work at exposing. Ely never made any bones about it. He proclaimed from the beginning his theory’s dependence on a substantive, grounding conception—“the American system of representative democracy”<sup>54</sup>—and indeed he took quite a few pages to expound that conception and its moral underpinnings.<sup>55</sup>

Not only was Ely unabashed about the substantive commitments embedded in his normative model of representative democracy. I see nothing to suggest he would have felt any need to deny that judicial applications of the Constitution’s relatively abstract, incompletely specified principles of pluralist-egalitarian representative democracy would require courts to make substantive value choices, or even that the requisite choices might turn out to be no less demanding of value-based reasoning by judges than are those involved in, say, modern substantive due process. It was not Ely’s contention, as far as I can see, that courts in this country should avoid entanglement in controversial, value-based reasoning (or “choice” if that is what you want to call it). It *was* his contention that, for the sake of the American commitment, both historically factual and morally commendable, to the representative-democratic ideal, courts should conscientiously strain to limit such entanglements to cases in which upholding that commitment required them. But the difference, then, between Ely and, say, John Rawls was not over whether judges should be imposing on the country their own controversial but honest-best interpretations, specifications, and orderings of incompletely specified, abstract values; it was over how the controlling, abstract values should be framed and conceived.

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52. Ely, *supra* n. 10, at 56, 58.

53. See generally Robert A. Dahl, *Democracy and Its Critics* 83-151 (Yale U. Press 1989) (offering a speculative, normative-prescriptive “theory of the democratic process”); Ely, *supra* n. 10, at 7; *id.* at n. 29 (citing Robert Dahl, *Democracy in the United States* 137 (3d ed., Rand McNally College Publ. Co. 1976) as authority for the American commitment to rule by a majority of the governed); Ely, *supra* n. 10, at 59-60 (citing the same work as authority for rejection of rule by philosopher-kings).

54. Ely, *supra* n. 10, at 77.

55. See *id.* at 73-88.

Ely's declared aim was to leave maximum latitude for choice to the operations of a representative-democratic procedure, on a certain, substantively robust, egalitarian-pluralist conception of what that procedure is, while still making judges actively responsible for upholding that conception. Rawls might perfectly aptly have explained his aim in exactly parallel terms: To leave maximum latitude for choice to the operations of a liberal constitutional-democratic procedure, on a certain, substantively robust conception of what *that* procedure is, while still making the judges actively responsible for upholding *that* conception. Thus the difference between Rawls and Ely is exactly on a par with the difference between Rawls and, let us say, Robert Nozick. You want to know why *Roe v. Wade* came out as it did? "We like Rawls, you like Ely, we win, [7-2]."56

Granted, neither Ely's nor Rawls's constitutional-interpretative prescription for judges comes down to a transparently simple drill that any fool can easily follow. (Granted, you or I or Larry Tribe might say that once Ely allows a beachhead for activist judicial review for the sake of representation-reinforcement, he has given away too much of the store of substantive controversy to make the rest worth trying to save.) But neither is Ely's an incomprehensible prescription, any more than Rawls's is, or one that a competent and comprehending judge cannot in good conscience undertake to follow as best she can. Whatever interventions courts may decide to make, Ely meant to say, they should stand ready in good faith to explain, to themselves and to others, either in terms of some value or values explicitly endorsed by the Constitution or else in terms of the Constitution's overarching, political-normative ideal, that of representative democracy. Ely thought he saw too many instances of judges not getting with that program (*Roe v. Wade*, for example), and he condemned them for it. He did so, for aught we can tell from his book, not because he blanched at controversy within the law or at judges laying down unprovable, controversial, even divisive constitutional rulings (witness Ely's support for *Brown*,<sup>57</sup> for *Reynolds*,<sup>58</sup> and for judicial invalidations of flag-desecration laws<sup>59</sup>), but because that is what he found was called for by fidelity to a certain, substantively loaded ideal of representative democracy that he both thought admirable and thought was laid down by America's positive constitutional legislation, properly understood.<sup>60</sup>

I conclude that Ely's book—or let me rather say Ely's text—does not reflect, any more than *A Theory of Justice* reflects, an "aspiration . . . to purge constitutional discourse of inevitably controversial claims about substantive rights and values."<sup>61</sup> Nor, hence, does it obviously fit with or explain Tribe's parting shots in "Persistence," his questions about the reasons anyone might have for such an aspiration, or about the

56. See *supra* n. 10, at 58. For further discussion, see text accompanying note 52.

57. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see Ely, *supra* n. 10, at 150-52.

58. *Reynolds v. Sims*, 377 U.S. 533 (1964); see Ely, *supra* n. 10, at 121-24.

59. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1483 (1975).

60. The same holds for other works cited by Tribe that inveigh against judges intervening against democratic decision except insofar as deemed necessary to uphold the structures and pre-conditions of a working representative democracy. Tribe, *supra* n. 1, at 1064 n. 3.

61. *Id.* at 1079.

prospects for constitutional theory in a situation defined in terms of our being stuck in its grip.

## VI

The aspiration to a constitutional law that evades substantive controversy, I have argued, cottons more to Rawls than to Ely.<sup>62</sup> Its wellspring lies not in the bottom-line concern for democracy that drives DPCT, but in the bottom-line concern for legitimacy that drives LPCT.<sup>63</sup> It is LPCT, not DPCT, that posits the idea of a governmental system—thus a body of constitutional law—agreeable to everyone, as an answer to the question of the possibility of legitimate government in conditions of widespread, intractable, potentially divisive disagreements over matters of fundamental rights and values that ground-level governmental acts inevitably engage. If I am right about this, then Tribe in “Persistence” does seem to have gotten LPCT and DPCT conflated or confused.

If so, he has a pretty good excuse. In Part II, I worked hard to surface differences between DPCT and LPCT. Now I want to offer a restatement aimed at highlighting their confusing similarities. To start with, these two types of theory proceed from a shared set of commonplace presuppositions. Both DPCT and LPCT divide a country’s law into two layers (so to speak), call them “ordinary” and “constitutional.” Ordinary law is all of a country’s law that is made by ordinary lawmakers—they being, simply, the officials and official bodies whose choices and actions are decisive of the content of the ordinary law, subject only to the condition of consonance with constitutional law. In the constitutional democracies comprising the field of interest to both DPCT and LPCT, ordinary lawmakers consist of elected legislative assemblies, aided by courts interpreting and applying their enactments, and they may also include courts exercising powers to elaborate and develop the prescriptive content of a corpus of “common” or “judge-made” law.

For the purposes of both DPCT and LPCT, constitutional law is law directed to establishing and prescribing the terms on which ordinary law is validly produced. Both DPCT and LPCT confront and debate the question of having these terms include controls on the permissible or mandatory content or “substance” of the law that ordinary lawmakers make (a “bill of rights”). Either way, in the sight of both, constitutional law is law meant to bind the operations of ordinary lawmakers, hence it is not amenable to change by ordinary lawmakers using ordinary lawmaking procedures, and furthermore is law that courts of law (at least one such court) are normally expected to enforce—to make effective by some sort of corrective judicial remedy—against ordinary lawmaking operations that are found to stray from its prescriptions.

Here is a further point of commonality between DPCT and LPCT. A theorist of either stripe may find reasons to urge that the constitutional law to be enforced by reviewing courts against ordinary lawmaking operations be crafted and construed,

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62. But we must take care not to overstate. Rawls’s view, fully described, is much richer and complex than the “LPCT” I have set up for present purposes. Rawls knew what Tribe knew: That “any liberal view must be substantive, and it is correct in being so.” John Rawls, *Reply to Habermas*, 92 J. Phil. 132, 170 (1995).

63. See *supra* nn. 10-16 and accompanying text.

insofar as possible, so as to cover matters of system and process only, leaving all (other) choices of government policy, and the orderings of substantive values that such choices encode or entail, to be decided by the system and process that courts are charged with upholding.

But if LPCT and DPCT may possibly agree about restricting judicially enforceable constitutional law to matters of process, still their bottom-line reasons will always be different. For DPCT, disfavor of judicial dictation of substance springs directly from the fact that the dictation is *judicial*—that is, it comes from democratically unaccountable judges. DPCT's rock-bottom commitment is to an ideal of democratic government that directly rejects judicial dictations of substance, saving those required for the preservation of democracy itself. For LPCT, the counter-democratic character of judicial dictation is not in itself an objection to substantive judicial review.<sup>64</sup> To any question about including this or that judicially enforceable restriction on allowable legislative substance in a country's system-shaping constitutional law, LPCT responds in the first instance not by asking whether the inclusion advances or detracts from *democracy*, but by asking whether inclusion advances or detracts from *systemic legitimacy*, the system's fairly ascribable agreeability to all. We have seen how John Rawls answers in a way that is flatly inconsistent with DPCT.<sup>65</sup>

But now matters grow tricky, because, *pace* Rawls, an *elementary* concern for legitimacy may lead other theorists—Jeremy Waldron is the best example—quite directly to a *derivative* concern for democracy, in the strongly procedural sense of a fair system of majority rule, free of any restraint on political outcomes save possibly those required for maintenance of the democratic procedural system “in . . . good working order.”<sup>66</sup> Rawls and Waldron differ, but not on making legitimacy the starting point, which Waldron plainly does, thus placing himself squarely within LPCT.<sup>67</sup> They differ down the line, on whether democracy, in Waldron's strongly procedural sense of the term, is a *sine qua non* for systemic legitimacy.

Waldron affirms it. Rawls denies it, affirming rather that legitimacy requires constitutionalizations of substance beyond any that Waldron or Ely could accept. A theory such as Rawls's thus makes fully manifest the deep difference between LPCT and DPCT, whereas a theory like Waldron's makes the difference harder to see. When Waldron's theory is on the table, the visible distinction between DPCT and LPCT is slight. All that is left to mark the theory as either DPCT or LPCT is its starting premise, assuming we can detect what that is. When the starting point is legitimacy, and democracy comes in only secondarily, derivatively, inferentially—that is, as a perceived requirement for legitimacy—the theory is LPCT; otherwise, DPCT. So if the theorist explicitly starts from legitimacy, as Waldron does—leaving open, at least in principle, the possibility that he would accept Rawls-style liberal constitutionalism if we could

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64. We here simply assume that all instances of non-process-perfecting judicial dictations of substance are properly regarded as counter-democratic—thus by-passing controversy over whether that is so. See e.g. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 14-35 (Harvard U. Press 1996) (maintaining that it is not so).

65. See *supra* nn. 14-16 and accompanying text.

66. Waldron, *supra* n. 13, at 1360.

67. See *id.* at 1371-72.

persuade him of the latter's superior conduciveness to liberal legitimacy—we can confidently classify his theory as LPCT. In other instances, however, classification may become difficult to the point of guesswork. Might that be true of Ely's theory?

I have so far treated Ely's theory as a plain instance of DPCT, but what makes me so certain? I can honestly say I know of no word ever written or spoken by Ely to suggest that he was deriving his commitment to democracy from a prior commitment to legitimacy. I recall no claim from him regarding the presumed agreeability to everyone of a representative-democratic governmental system. So far as I can tell, he simply thought that representative democracy, minimally encumbered by judges, was *right*—right for our country, at any rate—in virtue of that system's implementation of primary values of equality of concern, respect, and political agency, together with its having been prescribed for us by positive constitutional legislation. But what, actually, is the distance between thinking *that* and thinking that minimally encumbered democracy is right in virtue of its presumable maximum achievable agreeability to everyone as a system of government for a diverse society like ours, whose members cannot hope to find agreement on ground-level matters of substance—in other words, is to be preferred on grounds of legitimacy? That there is a notional difference there I do not doubt, but how large and telling *an applied* difference it can ever make is another question.

## VII

We stand now at the verge of explaining how it might have been that Tribe, addressing Ely in "Persistence," could easily and excusably have conflated two kinds of constitutional theory—DPCT and LPCT—that are conceptually distinct but that are not readily distinguishable when Ely's is the case specifically in view. Ely's, one might say, is a case that we can read one way or the other depending on where we are coming from, and Tribe just happened to read it as LPCT.

So far, so good, except for "just happened." Tribe *was* coming from somewhere in particular, I now wish to suggest, and that facts add to the picture a reason why *Tribe*, in particular, may have read Ely as LPCT—that reason being that *Tribe himself had been there*, was coming from there. For indeed we do find him there—I will show you just below—among the early progenitors of the LPCT of our time. In treating Ely as an instance of LPCT, Tribe may have been projecting onto Ely his own recent reflections about a possible cure in constitutional law for the problem of liberal legitimacy. Thus when Tribe, in "Persistence," writes of the impossible aspiration's grip on "our thought" and asks what that fact says about "our situation" and its prospects for constitutional theory, we can take those first-person plural possessives quite literally.

Consider some dates. "Persistence" appeared in 1980, Rawls's *Political Liberalism*—a watershed philosophical statement of LPCT—not until 1993. Rawls had published important and widely read anticipatory essays along the way, but not until after Tribe had written "Persistence."<sup>68</sup> Publications by other liberals on similar tracks,

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68. See e.g. John Rawls, *The Idea of an Overlapping Consensus*, 7 Oxford J. Leg. Stud. 1 (1987); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 Phil. & Pub. Affairs 223 (1985); John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. Phil. 515 (1980).



such as Thomas Nagel and Charles Larmore, also post-dated “Persistence.”<sup>69</sup>

It seems that Tribe was ahead of them all—I don’t mean in “Persistence,” I mean in his *Harvard Law Review* “Foreword” of 1973, “Toward a Model of Roles in the Due Process of Life and Law.”<sup>70</sup> In hindsight, Tribe’s Foreword (as I shall nickname it) appears to have LPCT affinities. LPCT, remember, is theory on the lookout for a constitution that everyone can fairly be called on to treat as legitimation-worthy, in circumstances where we cannot reasonably expect or demand a convergence of judgments on the moral merits of sundry laws and other governmental acts and outcomes, and hopes thus arise of grounding legitimacy on the acceptability to all of the constituted processes or system whence the outcomes issue.<sup>71</sup> LPCT works at developing design standards for such a constitution’s normative content; it produces arguments to support the standards it develops; and it promotes and defends efforts by judges and other officials to construe and apply the constitution we have so as to bring it as close to the proposed standards as a decent regard for text and legality will allow. Tribe’s Foreword fits that profile nicely.

It does so by proposing a change of subject, or of perspective,<sup>72</sup> for substantive due process argumentation in constitutional law, using the Supreme Court’s opinion in *Roe v. Wade* as its chief example of what not to do. The Court, Tribe says, should strive to avoid a reading of the due process guarantee that allows or invites direct assessments by official bodies of any sort, be they legislative or judicial, of the substantive merits—the rationality or proportionality—of any proposal to regulate abortion by law (defining abortion, in effect as termination of a pregnancy resulting in the death of a fetus that has not yet, in the view of a secular consensus, become a person protected by moral and civil laws against homicide<sup>73</sup>). True, the choice under assessment is framed as one about the comparative merits of alternative possible states of legal permission and restriction of abortion choices, not directly about the merits of any particular choice. The assessment nevertheless necessarily involves the official assessor in his or her own appraisal of the comparative weights of substantive considerations pro and con abortion choices. Any such appraisal that will have the force of law behind it, whether done by a court or by a legislature, thus comes too close to indistinguishability from a coercive public judgment on a moral matter regarding which no societal consensus exists or can be expected—meaning (this is my language, not Tribe’s) so close as to pose an unacceptable hazard to an overridingly important public value.

Partly in order to avoid this hazard (we postpone for a moment the question of what the overriding public value is), Tribe proposes a recasting of the question posed by constitutional law from what the *Roe* opinion too carelessly makes it look like.<sup>74</sup> Instead

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69. See e.g. Charles E. Larmore, *Patterns of Moral Complexity* 70-77 (Cambridge U. Press 1987) (on “liberal justice as a *modus vivendi*”); Nagel, *supra* n. 6; Larmore, *supra* n. 6; Nagel, *supra* n. 3.

70. See Laurence H. Tribe, *Foreword: Toward a Model of Rules in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973).

71. See *supra* nn. 10-11 and accompanying text.

72. See Tribe, *supra* n. 70, at 22 (speaking of the perspective of role-allocation, presumably as opposed to the perspective of value- or interest-balancing).

73. See *id.* at 25-29.

74. See *id.* at 10.

of asking for official assessments of the weights and balances of the merits factors entering into some category of choice that agents in civil society may face, the constitutional law of substantive due process is more accurately—and satisfyingly—understood as directed to a different sort of question, one about who gets to weigh and decide the merits authoritatively: Shall it be the legislature? The pregnant woman? Her husband or other putative prospective father? Her parents? Her doctor? If more than one of these, in what rank or combination? The law of substantive due process, or much of it, Tribe says, is better conceived as directed to the allocation of authority to decide a question or make a choice—a question of process—than to assessments of the substantive moral and other merits of one choice or another.<sup>75</sup>

Tribe argues in favor of a decision-privatizing doctrine—a “personal question doctrine”—under the aegis of due process.<sup>76</sup> In places, he seems to draw that suggestion from what we may call primary value-based grounds, roughly that individuals have moral rights to make certain decisions untrammelled by societal judgments, rights that any decent legal order should honor.<sup>77</sup> But also plainly making an appearance in the Foreword is a consideration of a distinctly different ilk, directed to the distinctly *political* value of political legitimacy. Visibly at work is an appreciation of legitimacy’s dependence on the law’s success in evading certain kinds of virulent controversy over values—a hallmark of LPCT.

Tribe’s Foreword does not speak in the terms of “legitimacy” and “political values.” Evident all the same is its anticipation of the concerns and hopes that others would come to inscribe in that vocabulary. In the view of the Foreword, an appreciable virtue of a constitutional allocation of authority over certain classes of decisions to private parties is that it does in fact assist the law in evading certain kinds of virulent conflict over values.<sup>78</sup> By privatizing a class of decisions, you head-off divisive political struggles over them that would otherwise be sure to arise, and so also reduce the dangers such struggles pose to political legitimacy and stability.<sup>79</sup> (If early-term abortions are as morally atrocious as some of us believe, *and if we can prohibit them by law*, then the struggle to prohibit them by law is one to which some of us must be ceaselessly committed.) Privatization-by-constitution, for this legitimacy-serving purpose, is a staple strategy of LPCT.<sup>80</sup> We can evade the political hazards of disagreement by

75. See *id.* at 10-11.

76. *Id.* at 32.

77. See Tribe, *supra* n. 70, at 32.

78. See *id.* at 21-22 (observing that legislatures are caught in a “whirlpool of religious controversy” as long as they are thought to retain a “decisional role” over abortion); *id.* at 24 (referring to “the continual pressures to which the milieu subjects lawmakers as long as they retain a decisionmaking role”). Privatization of decisional authority is the dimension of role-allocation with which the Foreword is centrally concerned. See *id.* at 15-16.

79. See *id.* at 22 (endorsing the view that the Constitution aims to prevent “a union of government and religion [that] tends to destroy government and to degrade religion”) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

80. A widely known statement is Stephen Holmes, *Gag Rules or the Politics of Omission*, in *Constitutionalism and Democracy* 1 (Jon Elster & Rune Slagstad eds., Cambridge U. Press 1988). See *id.* at 20-21 (citing Rawls as exemplary of the theme); McCarthy, *supra* n. 6, at 56 (explaining liberal legitimacy gains expected from a shift of debate from the level of “opposed beliefs” (abortion-or-no) to the level of a constitutional guarantee of freedoms of choice and of conscience). For a less optimistic view of the same liberal strategy, see Karl Marx, *On the Jewish Question*, in *Karl Marx, Selected Writings* 39, 47-57 (David

agreeing to disagree, each attending to his or her own vine and fig tree. What could be more reasonable? Cannot everyone be expected to agree to that, for legitimacy's sake, for at least some classes of choices?

Which classes of choices? Tribe's Foreword does not insist that all questions of constitutional limits on state regulations of private choices should be cast into role-allocation terms, it only says that some should. The class that draws Tribe's chief attention in the Foreword is choices dependent on value determinations for which there is no apparent basis outside of sectarian religious doctrine—that being exactly how the Foreword depicts the core of the debate over the moral merits and demerits of abortion.<sup>81</sup> It is *religiously inflected* battles in the culture wars that the Foreword is especially anxious to sidetrack—just as, interestingly, it was the experience “the wars of religion” of the sixteenth and seventeenth centuries that provided John Rawls with an anti-model for his version of LPCT.<sup>82</sup>

The reason for this is apparent in both cases: It lies in the authors' belief in the special virulence and intractability, the special potential for destruction of political stability and legitimacy, of religion-based conflicts over moral values.<sup>83</sup> But we also find in the Foreword a suggestion of a broader expectation that judicial administration of a constitutional law addressed to “the merits of alternative allocations of roles” can be made more persuasive to everyone than judicial pronouncements, in the Constitution's name, on “the merits of exercising various roles in particular ways.”<sup>84</sup>

## VIII

Tribe's Foreword stands as an early entry in our generation's proceduralist turn in constitutional theory. I cannot undertake to gauge its possible contribution to stimulating other entries that came later onto the scene; that is a task, if it matters, for someone better versed than I in the modes and methods of the history of political ideas. The point I am after here is different. The fact may be—I do not pretend to know—that at the time Tribe wrote “Persistence,” his rejoinder to John Ely, he was also engaged in reflection on the LPCT-type position he had staked out in the Foreword. Ely may have served Tribe as a foil for . . . himself.<sup>85</sup> The arguments of impossibility that Tribe mounted in “Persistence” against the aspiration to steer constitutional law clear of substantive controversy may have been as much a product of his own continuing ruminations about the Foreword as of anything written by Ely. One cannot know. It does not really matter.

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McLellan ed., Oxford U. Press 1977).

81. See Tribe, *supra* n. 70, at 18-22 (finding that the doctrines of organized religions are currently the only available sources for conflicting judgments about when life begins).

82. See Rawls, *supra* n. 3, at xxiii-xxiv.

83. See Tribe, *supra* n. 70, at 22 (treating government entanglement in religious controversy as a special “source of alarm”).

84. *Id.* at 51.

85. I note for the record Tribe's remark in a memorial tribute to Ely:

[N]ow, years later, I've come to see a convergence between the theme of personal and political self-governance around which my own theorizing revolves and the basic theme John laid out so elegantly nearly a quarter century ago [in *Democracy and Distrust*].

Laurence Tribe, *The Ones I Feel Sorry For*, 117 Harv. L. Rev. 1760, 1763 (2003).

What does matter is that Tribe's critique of Ely in "Persistence" did in fact raise questions that hound LPCT to this day and that have not yet, so far as I know, been put to rest.

Responding to perceptions of unbridgeable disagreement in society over matters of fundamental right and fundamental value, LPCT offers a deflection of the burden of legitimation—of the moral defense of governmental and legal coercion—from ground-level political acts to a constitutional system that authorizes them. But then LPCT may further find, as it does in John Rawls's hands and as I fully expect it would have to in Laurence Tribe's, that a constitutional procedure cannot bear that burden—cannot be accounted legitimation-worthy—if it does not take sides on certain matters of fundamental right and value including some obviously quite divisive ones. And where, then, does that land us? If we cannot look for liberally legitimating convergence on judgments of the substantive merits of ground-level political acts, what makes us think we can look for liberally legitimating convergence on a constitution that consists, in indispensable part, of somewhat abstract but still highly substantive principles and standards by which the ground level acts will be judged constitutional or not? However one might answer—and answering is no simple matter—there can be no doubting the question's force and cogency. Who that has read Tribe on Ely, in "Persistence," can swear that he did not learn it there?

Can we avoid the question's sting by recasting issues of substance into issues of process? By shifting from the question of the merits to that of who gets to decide the merits, and then deciding the meta-question in favor of the non-governmental sector? Any reader of "Persistence" must come away doubting. "[A] political conception of justice," it has more recently been written,

presupposes a certain view of the controversies it would bracket. For the debate about abortion is not only a debate about when human life begins, but also a debate about how reasonable it is to abstract from that question for political purposes [that is, by agreeing to submit ourselves to a constitutional principle of privatization: of autonomy, privacy, or an individual right to choose for oneself]. Opponents of abortion resist the translation from moral to political terms because they know that more of their view will be lost in the translation . . . . The moral price of political agreement is far higher if abortion is wrong than if it is permissible.<sup>86</sup>

Michael Sandel's riposte to Rawls seems to me entirely in the spirit of Laurence Tribe's riposte to Ely, and, if I am right, to himself as well. I do not say Sandel learned it from Tribe; only that he very well might have.

## IX

"[W]hat does it say about our situation, and about the prospect for constitutional theory, that views so deeply problematic continue to exert so powerful a grip upon our thought?"—Tribe inquired at the end of "Persistence." He did not answer on the spot.

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86. Michael J. Sandel, *Democracy's Discontent: In Search of a Public Philosophy* 20 (Harvard U. Press 1996).

This was, he wrote, a matter “to be explored in a later essay.”<sup>87</sup>

But answer came there none. Tribe did later publish a short piece under the title of “The Futile Search for Legitimacy,”<sup>88</sup> but no answer is there to be found. Futile, Tribe argued, is the search for sovereign solutions to worries about unconstrained exercises of power by unelected judges.<sup>89</sup> Futile, yes, and dangerous to boot, because any purported solution will “encourage us all to forget that *no* exercise of power, in any society the planet has ever seen, is genuinely unproblematic.” (I hope you hear the resonance with LPCT.)

What follows? That we should stop asking the question of the moral defensibility of the force of law *tout court*? The annals of political-theoretic speculation do, after all, suggest several sorts of possible grounds for dismissing as futile any search for political legitimacy in that, our chosen sense. If power is an unavoidable fact of social life, if power has to reside somewhere in society, then obsessing over justification for its exercise might be a mistake, a waste of time and energy better spent on something else. Alternatively (think of Dostoevsky’s *Grand Inquisitor*), moral justification for official power is always unquestionably present, because official power is inseparable from social order and an extant regime of social order is always and obviously preferable, on moral grounds, to the alternative of Hobbesian disorder. And anyway, the question of legitimacy is always already settled, and acceptably so, by brute social facts of adherence and acceptance of the extant regime by a preponderance of a country’s people—facts that occur independently of anyone’s conscious reflection, assessment, or judgment regarding the respect-worthiness of a regime, so why worry?

Does any of that sound like the Laurence Tribe we know? The man, I mean, who distances himself from the companies of “cynics,” of “legal nihilists,” of those who regard constitutional law as “a legitimating mask for what those in power can get away with?”<sup>90</sup> When that Tribe speaks in that chapter of the futility of the search for legitimacy, he cannot mean that the question is one we may ever permit ourselves to stop asking. Unanswerable with finality though the question may be, the persistency of its demand on our attentions should pose no puzzle to our man. For what achievement, after all, could we more honor him than for his own persistent contributions to advancement of the quest?

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87. Tribe, *supra* n. 1, at 1080.

88. See Tribe, *supra* n. 4, at ch. 1.

89. See *id.* at 3.

90. *Id.* at 3-4.